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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-628

LIBERTY NATIONAL LIFE INSURANCE COMPANY, and BROWN-SERVICE FUNERAL HOMES COMPANY, INC.,
Petitioners,

vs.

EDGAR H. BATTLE, dba EDGAR H. BATTLE FUNERAL HOME; OTIS ARMOUR, JR., dba ARMOUR FUNERAL HOME; JOHNSON MEMORIAL FUNERAL DIRECTOR, INC.; TAYLOR HODGE, dba HODGE FUNERAL HOME; HENRY CILLIE, dba CILLIE FUNERAL HOME; EUGENE ERVIN, dba ERVIN FUNERAL HOME; S. T. MADDEN, dba MADDEN FUNERAL HOME; S. C. PERRYMAN, dba S. C. PERRYMAN FUNERAL HOME; R. L. LUMZY, JR., dba LUMZY FUNERAL HOME; J. K. JEFFRIES and FLOYD E. LONG, IND. & dba HAMILTON FUNERAL HOME; WHITFIELD MILES, IND. & dba MILES FUNERAL HOME,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

I

QUESTIONS PRESENTED FOR REVIEW

1. Does the "business of insurance" within the meaning of the McCarran-Ferguson Act encompass activities of an insurance

company which prevent or restrain competition among persons and firms in the funeral business, even when the challenged activities include specific acts of boycott, coercion and intimidation?

2. Does the existence of a Consent Decree entered into between the petitioners and the United States in 1954 immunize the petitioners from claims by private plaintiffs who were not parties to that decree for all antitrust violations, even when petitioners have violated the Consent Decree?

3. Can the fact of common ownership of two corporations who have availed themselves of the privilege of doing business through separate corporations save them from all of the obligations that the law imposes on separate entities, even when it is not necessary to allege a combination or conspiracy to allege a violation of Section 2 of the Sherman Act?

II

STATEMENT OF THE CASE

This action was brought in 1970 by funeral homes and directors of funeral homes against Liberty National Life Insurance Company (Liberty National) and Brown-Service Funeral Homes Company, Inc. (Brown-Service) charging the petitioners with numerous anticompetitive practices in the funeral business in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1, 2; and Section 3 of the Clayton Act, 15 U.S.C. §§ 14, et seq.

The gravamen of the complaint is that at Liberty National's instigation, and with Brown-Service's assistance, the collective activities of the petitioners have resulted in control over a substantial portion of the market in funerals. The result is that all funeral directors in Alabama are faced with the choice of allow-

ing the petitioners to regulate the operation and maintenance of their funeral business or be foreclosed from a substantial share of the funeral market.

For over twenty-five years, Liberty National has issued burial insurance policies to such an extent that there are over two million, eight hundred thousand (2,800,000) policies presently in force, with the great majority of these policyholders residing in Alabama. (R 10, 12). In 1970, seventy percent (70%) of all white persons, and fifty percent (50%) of all persons, without regard to race, who died in Alabama had burial policies issued or guaranteed by Liberty National. (R. 12). In some areas of Alabama, ninety-five percent (95%) of all persons own a Liberty National burial policy. (R. 39). There are two basic policies issued: one which promises to provide a funeral equal to the "retail value" of Three Hundred ($300.00) Dollars, and one promising a funeral equal to the "retail value" of Six Hundred ($600.00) Dollars. The "retail value" is arbitrarily set in each policy by Liberty National, and the policyholder is not paid the "retail value." In lieu of cash, the policyholder is promised certain merchandise and services, the only difference in the two policies being the use of a metal or wooden casket. (R. 10, 11).

Brown-Service, a separate corporate entity and wholly-owned subsidiary of Liberty National, has contracted with Liberty National to furnish the merchandise and services required by the burial policies issued by Liberty National (R. 14, 15). Brown-Service has obtained agreements with funeral directors in Alabama who are designated "authorized funeral directors" and are required to furnish services and merchandise to Liberty National policyholders at prices set by Brown-Service. (R. 15, 16). For servicing the "$300.00 policy", the funeral director receives only Ninety ($90.00) Dollars. He receives only One Hundred Eighty ($180.00) Dollars for servicing the "$600.00 policy." He is required to furnish and perform identical services under both policies. (R. 34). If a policyholder takes his business to

an unauthorized funeral home, the benefits conferred under the policy include only a casket or, depending on the policy, a cash settlement. (R. 16).

Brown-Service currently has a contract with one hundred and ninety-two (192) of the total of two hundred and twenty-four (224) funeral homes in Alabama. Of the one hundred fourteen (114) funeral homes catering to the white community, only seven (7) homes have managed to fend off the control of Brown-Service. All seven of these homes, six of which are controlled by one man, sell their own burial insurance. The remaining one hundred and seven (107) directors are "authorized funeral directors". Of the one hundred and ten (110) homes catering to the black community, eighty-five (85) operate under a contract with Brown-Service and are "authorized funeral directors". (R. 16)

Funeral directors who have not entered into a contract with Brown-Service and who perform services equivalent to those called for under the policy receive no fee from Brown-Service The authorized director located in that service area receives the service fee although he has performed no services. (R. 33).

Brown-Service owns fifty-nine (59) funeral homes which are leased to funeral directors in Alabama. The leases require rental payments equal to a percentage of the gross receipts of the funeral director. All lessees must be "authorized funeral directors" and if Brown-Service cancels the funeral service contract, it may terminate the lease upon two days notice. (R. 10-20). Liberty National also owns funeral homes which are leased only to "authorized funeral directors".

The standard contract between Brown-Service and the funeral directors requires the director to do the following:

(1) Use caskets furnished by Brown-Service when providing services under a policy. (R. 31).

(2) Display in the funeral home merchandise furnished the director by Brown-Service. (R. 18).

(3) Post in noticeable places his prices for all funerals and vaults and adhere to these quotations without giving discounts. (R. 31).

(4) Maintain the funeral home and equipment to meet certain standards set by Brown-Service and be subject to inspection by Brown-Service to insure compliance. (R. 90—Paragraph 17).

(5) Refrain from sale of Brown-Service merchandise to customers other than Liberty National policyholders (R. 88—Paragraph 7). If the funeral director violates any of these provisions, Brown-Service may terminate the contract immediately. (R. 90—Paragraph 23).

Liberty National has engaged in the following activities which have intimidated, coerced and boycotted funeral directors in Alabama:

(1) Made known a long range program of building funeral homes and leasing them only to persons who would become authorized funeral directors or only if they remained authorized directors. (R. 33).

(2) Agreed to lend money at favorable terms and rates to funeral directors only if they agreed to become or remain authorized directors. (R. 33).

(3) Forced funeral directors to become or remain authorized funeral directors by threatening to build a competing funeral home in the same trade area and placing an authorized dealer in the new home. (R. 35). These threats have been carried out by building facilities of modern design. (R. 42).

(4) Allocated territories by arbitrarily applying standards of acceptability so as not to allow a funeral director to become authorized. (R. 36).

(5) Used concocted complaints of policyholders to intimidate funeral directors. (R. 36).

(6) Made loans to funeral directors to keep them indebted and thereby economically coerce them to remain under contract to Brown-Service. (R. 41).

(7) Forced one or more funeral directors to sell their business by threatening to cancel the director's contract with Brown-Service. (R. 44).

(8) Threatened to cancel funeral service contracts of authorized directors who voiced opposition to prices paid these directors for their services. (R. 44-45).

(9) Threatened physical violence in its efforts to monopolize the funeral business in Alabama. (R. 45).

The petitioners do not challenge the violations alleged, but seek immunity for their actions by virtue of the McCarron-Ferguson Act and a 1954 Consent Decree.

III

SUMMARY OF ARGUMENT

In a case involving a unique set of facts, petitioners contend this Court should consider a motion to dismiss the complaint before the complete facts are developed at trial. Petitioners urge this Court to grant a writ of certiorari without giving a single, or important reason, or even citing Rule 19 of this Court. It is contended simply by petitioners that the Fifth Circuit Court of Appeals erred in holding that the motion to dismiss should be overruled. They contend the motion should be granted because petitioners are exempt under the McCarran-Ferguson Act, are immune as a result of a 1954 Consent Decree, and because a conspiracy between a corporation and its subsidiary is not actionable.

Liberty National cannot monopolize the funeral business, require funeral directors to perform duties which Liberty National has not promised in its policies of insurance, or engage in additional conduct that does not come within the scope of the business of insurance and claim a McCarran Act exemption. The McCarran Act does not exempt acts of boycott, coercion and intimidation, and such acts are specifically alleged in the complaint. Brown-Service is not an insurance company.

The petitioners and the United States Government entered into a consent decree in 1954. The petitioners are subject to attack under the antitrust laws by respondents (private persons), despite the existence of the consent decree. This principle of law controls even if petitioners have complied with the terms of the consent decree. The consent decree of 1954 enjoined Liberty National and Brown-Service from hindering and restricting funeral directors in their business of providing funerals. As alleged, the petitioners have violated the decree.

A combination or conspiracy between a parent corporation and its wholly-owned subsidiary is actionable under the Federal antitrust laws. When the joint activities of the two companies have adverse effects on independent or outside business entities, the conspiracy is actionable under the most stringent application of the intra-enterprise doctrine. The respondents' complaint charges petitioners with Sherman 2 violations of monopolizing or attempting to monopolize the funeral business. One corporation, acting alone, can engage in illegal Sherman 2 activities, there being no requirement that the corporation act in concert with another entity. Therefore, if there were absolute immunity for a combination between a parent and any subsidiary, the complaint states a cause of action under Sherman 2, and a motion to dismiss raising the intra-enterprise defense is due to be overruled. This defense is not available to petitioners for the additional reason that the contracts between Brown-Service and the authorized funeral directors are contracts in restraint of trade in violation of Sherman 1.

IV

ARGUMENT

A. Considerations Governing Review of Certiorari.

The respondents filed suit on October 6, 1970, and after more than four years, are now before this Court seeking to uphold the ruling of the Fifth Circuit that the motion to dismiss the complaint should be overruled. The complaint alleges a set of circumstances peculiarly applicable only to the operations of funeral homes in the State of Alabama. Petitioners do not address themselves to the requirements of Rule 19(b) of the Rules of the Supreme Court of the United States or, except in their Conclusion, assert any of the reasons stated therein as to why this Court should grant their petition. They are simply asking this Court to consider the initial pleadings, which set out a unique fact situation, and rule of the applicable law before the complete facts are developed after a full trial. It has long been the policy of this Court not to consider cases on a piecemeal basis, and any of the arguments advanced in petitioners' brief could best be decided after reviewing a complete record. After resisting respondents' efforts to seek an opportunity of a trial for over four years, the petitioners now assert only that the Fifth Circuit was in error and give no special or important reason for granting Certiorari as required by Rule 19 of this Court. Apparently, petitioners contend a writ of certiorari is a matter of right in direct contradiction of the first sentence of Rule 19.

B. The Complaint Is Sufficient Against a Motion to Dismiss.

This suit was originally filed on October 6, 1970, and the District Court granted the Defendants' Motion to Dismiss with prejudice and without leave to amend on October 31, 1972. The Court found that the Complaint failed to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal

Rules of Civil Procedure. The standards to be followed in testing the Complaint under this rule are well known to this Court and will only be restated briefly at the outset. This Court, in following the spirit and aims of Federal procedure, has set down a general guideline for considering a Complaint.

> In appraising the sufficiency of the Complaint we follow, of course, the accepted rule that a Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957).

In approving the language of *Conley*, supra, the Fifth Circuit in 1967 applied this standard specifically to antitrust pleadings.

> *As applied to antitrust pleadings* in a case where the Complaint was dismissed for lack of jurisdiction and for failure to state a claim upon which relief could be granted, the Supreme Court has said that *the test as to sufficiency is whether the claim alleged is wholly frivolous.* (cases cited); *Dailey v. Quality School Plan, Inc.*, 380 F. 2d 484, 486 (5th Cir. 1969) (Emphasis supplied)

The Fifth Circuit correctly determined that the respondents' complaint met the test as to sufficiency.

C. **The McCarran-Ferguson Act**

1. *The Business of Insurance.* Petitioners contend that the pleadings conclusively establish that the activities complained of constitute the "business of insurance" within the meaning of the McCarran-Ferguson Act (McCarran) as to both Liberty National and Brown-Service.

(a) *Liberty National.* Liberty National is not exempt from the Federal antitrust laws merely because it is an insurance

company. In determining the applicability of McCarran, it is necessary to examine the activities of Liberty National which are challenged in the complaint and then determine if these activities are within the "business of insurance" as contemplated by the McCarran Act. As stated in *Securities and Exchange Commission v. National Securities*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2nd 668 (1969), the statute did not purport to make the states supreme in regulating all the activities of insurance *companies*, its language refers not to the person or companies who are subject to state regulation, but to laws regulating the *business* of insurance.

> But whatever the exact scope of the statutory term, it is clear where the *focus was*—it was *on the relationship between the insurance company and the policyholder*. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the business of insurance (Emphasis supplied).

Although petitioners cite cases which deal with title insurance, life insurance and hospital insurance, they cite only one reported case which considers burial insurance.

In *Holly Springs Funeral Home v. United Funeral Service*, 303 F. Supp. 128 (D.C. Miss. 1969), the District Court dismissed the complaint after a trial. The plaintiff was a funeral director and burial insurance salesman. The Court found that in Mississippi it was customary for funeral homes to sell, as agents, burial policies within their market area. These policies also provided for a cash settlement in the event it was impractical for an authorized funeral home to handle the funeral. As the Fifth Circuit in the instant case noted however, there is one distinction between the funeral businesses in Alabama and Mississippi. In Mississippi a funeral home has no contractual obligation with anyone but remains free to solicit burials irrespective of burial insurance. In Alabama, a funeral home must give up a substantial portion of the funeral market to maintain this freedom.

Petitioners cite *Travelers Insurance Company v. Blue Cross of Western Pennsylvania*, 361 F. Supp. 774, Aff'd 481 F. 2d 80 (3 Cir. 1973) as authority to support their Motion to Dismiss. But in *Blue Cross*, the Trial Court reached its conclusions only after a lengthy trial, only after the facts had adequately been developed to make a conclusive determination that the defendant fell within the McCarran exemption. Also as the Fifth Circuit noted, the relationship between the insurance company and the hospitals in *Blue Cross* was a direct contractual relationship. The facts as alleged in this complaint show that Liberty National has exceeded the business of providing insurance and encroached upon the business of providing funerals. The contracts between Brown-Service and the funeral directors require the directors to perform duties which Liberty National is not obligated to perform under their policies. Liberty National has also engaged in additional conduct that does not come within the scope of the business of insurance. These requirements and activities are set out in the opinion of The Fifth Circuit at pages 23 and 24 of the Appendix to Petitioners brief.

Respondents do not attack the insurance contracts existing between Liberty National and its policyholders. Liberty National made its own choice to sell a policy which promised services and merchandise rather than promising cash. They could have chosen to pay each policyholder bushels of corn, a new automobile or any other commodity. Would this then allow the insurer to engage in anticompetitive practices against corn producers or allow them to monopolize the automobile industry? Would injured corn producers and automobile manufacturers both be barred because of an insurance exemption? If this were the law, an insurance company could be used merely as a vehicle to control another industry with complete immunity from the Federal antitrust laws.

In *Hill v. National Auto Glass Company, Inc.*, 293 F. Supp. 295 (N.D. Cal., 1968) and in the same case reported in 1971 Trade Cases § 73,594 (N. D. Cal. 1971), an automobile glass

installer brought an action against a liability insurer alleging antitrust violations by the insurer and others. The complaint charged that the insurer made arrangements on behalf of its insured and claimants for the sale, installation and service of automobile glass. In the 1968 *Hill* opinion the Court interpreted the scope of the "business of insurance" and refused to dismiss the complaint.

> While the settlement of claims by the payment of money could certainly be considered to reasonably fall within the general meaning of "business of insurance", it does not seem to this Court that the alleged activity involved here, namely, securing for particular glass dealers the sales and installation jobs required by Allstate claimants, is a part of the "business of insurance" as the term is normally understood. (Page 296)

Faced with the same question, the Court in the 1971 *Hill* decision again rejected the claimed McCarran exemption.

> Congress at no time indicated an intent to give insurance companies carte blanche to operate in concert with non-insurance companies. The McCarran Act will be narrowly construed by this Court to extend only so far as the problem it sought to solve. cf. *SEC v. National Securities*, 393 U.S. 453, 459 (1968). In this case the allegations of the complaint are that Allstate Insurance combined with National Auto Glass, an automobile glass shop franchisor, and others, to allocate business, fix prices, and boycott other glass sellers. These activities are alleged to have a tendency to monopolize the relevant market. Such activities, while they may be practiced by insurance companies, cannot be said to have been contemplated to be the "business of insurance" as contained in the McCarran Act. Accordingly, the Court finds that the McCarran Act does not apply to the above conduct, and therefore the defendant Allstate's motion to strike the antitrust sections of the complaint will be denied.

Just as the activities of Allstate in the glass industry go beyond the business of insurance, the activities of Liberty National have encroached on the business of providing funeral merchandise and services.

An analogy of the labor collective bargaining anti-trust exemption cases makes even clearer that Liberty National is not exempt. The basic premise of the labor exemption and the limits of its application were set forth in *Allen-Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1944). In that case, the union secured closed-shop agreements with all electrical contractors and manufacturers in the New York City area; they also obtained agreements binding the employer-contractors to purchase equipment only from those local manufacturers who had closed-shop agreements with the defendant. The Court found such restraints of trade achieved in concert between the union and *non-labor groups* to be *outside* the exception of § 17 of the Clayton Act (15 U.S.C. § 17), and thus subject to the Federal antitrust laws (i.e. the activities were not "the business" of labor legitimate collective bargaining); noting (325 U.S. at pp. 809-810):

> We think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services . . . the exemptions granted the unions were special exemptions to a general legislative plan . . . Our holding means that the same labor union activities may or may not be in violation of the Sherman Act; dependent upon whether the union acts alone or in combination with business groups.

Inserting "insurance companies" for "unions" and companies and firms not engaged in the insurance business but in the business of the sale of funeral merchandise and the providing of funeral services for "non-labor groups" and "business groups" in the above language, highlights the applicability of the *Allen-Bradley* doctrine to the McCarran Act.

(b) *Brown-Service.* Petitioners contend Brown-Service is engaged in the business of insurance in direct contradiction of the allegations of the complaint. Attached to the complaint and incorporated therein is the Master Funeral Service Contract between Liberty National and Brown-Service (R. 74-83). The petitioners in that contract clearly state the nature of the business of Brown-Service but apparently ask this Court to overlook their own written declarations:

> Brown-Service is engaged in the manufacture and sale of funeral service merchandise and of providing services for the funeral and burial of deceased persons (R. 74).

Brown-Service, which is not an insurance company, cannot rely on an exemption relating to activities which constitute the business of insurance.

2. *Boycott, Coercion and Intimidation.* Petitioners, at page 21 of their brief, accuse respondents of lacing their complaint with "bald allegations" and "bald conclusions" of boycott, coercion and intimidation. After making this accusation, they then refuse to even acknowledge in their brief the following allegations in the complaint of illegal activities of Liberty National:

(1) Arbitrary application of standards of acceptability to prevent a funeral director from becoming authorized. (R 36)

(2) The use of concocted complaints of policyholders to intimidate funeral directors. (R. 36)

(3) The use of force to require a funeral director to sell his business. (R. 44)

(4) The use of threats to cancel funeral service contracts of authorized directors who raised opposition to prices paid these directors for their services. (R. 44-45)

(5) The use of threats of physical violence in efforts to monopolize the funeral business in Alabama. (R. 45)

Petitioners do not answer or explain these allegations, because they cannot. They reply simply "that funeral directors have the key in their own hand," but this key does not unlock the door to a free competitive market in the funeral business in Alabama. The Fifth Circuit, in their opinion in this case, recognized that Liberty National and Brown-Service had locked the door:

> At Liberty National's instigation and Brown-Service's assistance, the collective activities of the defendants have resulted in control over a substantial portion of the market in funerals. And it appears true, as the plaintiffs contend, that if a person wanted to enter the funeral business in Alabama, he would have to either sign a contract with Brown-Service or automatically relinquish the opportunity to attract business from this portion of the market. (A. 14)

Petitioners apparently would have this Court believe that all authorized funeral directors have freely chosen to accept $90.00 on a $300.00 policy, $180.00 on a $600.00 policy and have their operations regulated by Petitioners. It is totally unreasonable to assume that anyone would voluntarily agree to such inequitable terms and conditions.

Petitioners cite *Addrisi v. Equitable Life Assurance Society of U. S.*, —F. 2d—, 1974-2 Trade Cases § 75,274 (9 Cir. Sept. 30, 1974), in which a policyholder brought suit against the insurance company which issued the policy. The Court in *Addrisi* was concerned with the relationship between the policyholder and insurance company, as expressed in *Securities and Exchange Commission v. National Securities*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969). After holding that the insurance company was exempt from the action brought by the policyholder, the Court set out its reasoning:

> We believe to hold otherwise would vitiate the McCarran-Ferguson Act in its concept of setting over unto the several states the regulation and protection of the insurer-insured relationship.

This relationship simply does not exist in this case. Even if *Addrisi* were extended only to protect agents of insurance companies, that Court would not condone prohibiting or excluding persons or firms from becoming insurance agents. The Brown-Service contracts, in paragraph 20, do not permit authorized funeral directors to engage in the business of burial insurance directly or indirectly, as agent or employee. (R. 90)

A limited application of 15 U.S.C. 1013(b) as urged by petitioners overlooks the express intent of Congress as revealed in the Congressional Record. In its section analysis of the McCarran Act, found in Report No. 143, 79th Congress, First Session, and entitled *Expressing the Intent of Congress With Reference to the Regulation of the Business of Insurance*, the House of Representatives states as follows:

> . . . And (b) provides that at *no time* are the prohibitions in the Sherman Act against *any* act of boycott, coercion or intimidation suspended. These provisions of the Sherman Act remain in *full* force and effect. (Emphasis supplied)

Inescapably, under the most limited application of § 1013(b), petitioners cannot contend that they can boycott, coerce and intimidate persons or firms not engaged in the business of insurance but engaged in the business of providing funerals and claim a McCarran exemption.

D. The Consent Decree of 1954.

Petitioners contend their Motion to Dismiss was properly granted based on a consent decree entered between the petitioners and the United States in 1954. They assert that they

have been engaging in conduct which is permissible under this decree and state, at page 32 of their brief, "since the respondents ask only for treble damages and offered no feasible proposal to improve the accommodation of the consent decree, respondents are not entitled to any relief in this action . . ."

This action was brought because Liberty National and Brown-Service have entered into an agreement or understanding and have embarked on a plan and program to hinder, restrict and prevent funeral directors in Alabama from selling funeral merchandise and performing funeral services. If the funeral directors are free to sell their merchandise and services in a competitive market, unrestricted and unrestrained by Liberty National and Brown-Service, then they have no cause of action. But the complaint is replete with how the funeral business has been monopolized and how the business of the funeral directors is hindered and restricted by petitioners.

The funeral director must do business with Brown-Service and Liberty National or be foreclosed from attracting any business from a substantial portion of the funeral market. Seventy percent (70%) of all white people who die in Alabama have a Liberty National policy and in some areas ninety-five percent (95%) of the people have such a policy. The services provided under the policy differ significantly, depending on whether an insured uses an authorized or unauthorized funeral home. If an unauthorized director is used, the policyholder could receive only a casket rather than all the services promised under the policy. The obvious choice of the policyholder is to use an authorized director, effectively foreclosing as much as 95% of the market to an unauthorized director.

In order to compete for this market, the funeral director is forced to agree to maintain the funeral home and equipment to meet the requirements of Brown-Service. He is forced to accept $90.00 for a $300.00 policy and $180.00 for a $600.00

policy. He is told what merchandise he must provide, to whom he can sell certain merchandise, and is prevented from giving discounts on some of his merchandise. Regardless of his choice of two evils, the director in 1970 was hindered, restricted and prevented from selling funeral merchandise and performing funeral services.

Have the petitioners complied with the Consent Decree of 1954? In paragraph six of the Decree, *petitioners were specifically enjoined and restrained from adhering to any agreement, plan or program, directly or indirectly, with any funeral director in Alabama which hinders, restricts or prevents any such director from selling funeral merchandise or performing funeral services for any other person.* (R. 170). If petitioners had complied with what they had agreed to do in 1954, this action would have never been filed. Surely petitioners do not contend that they can flagrantly violate a Decree and then claim they are immune from a treble damage action by virtue of the very decree which they have violated.

On June 29, 1954, the United States filed a complaint against the petitioners. (R. 153-162). Thirty minutes later the petitioners filed their answer (R. 163-165) and the Consent Final Judgment was filed the same day. (R. 166-173). In 1954, there were no provisions in effect which afforded interested parties an opportunity to object to the terms of the settlement.

In 1914, Congress passed the Clayton Act, and Section 5(a) in its final form provided that under certain circumstances a decree in a case brought by the government which held that a defendant has violated the antitrust laws could be introduced in a private action (15 USC 16(a)). Prior to passage of the act, the proposed legislation provided that a defendant could use a favorable decree in a government action as conclusive evidence in a private action. 51 *Cong. Rec.* 9491 (1914). The arguments advanced in 1914 by Mr. Cullop against the

use of a favorable decree are applicable to petitioner's contentions in 1974.

> The courthouse doors ought to swing inwardly, and do to every citizen of this country. Yet if we enact this provision as the committee has brought it in here we have closed the doors of the courthouse to the citizens of this country. That is a matter of the highest concern to them. We will have denied to the citizen by the enactment of this provision the right to go into Court and recover damages for wrongs inflicted. Why? Forsooth, because a collusive suit has been brought in some place, or had been tried without preparation, or had been tried without sufficient evidence; and yet a stranger, an innocent person, is bound by that decree. He had no say; he took no part in it; and yet by this proposed legislation the door would be shut against him and his cause of action. We are adopting antitrust legislation for relief to a suffering public, furnishing a remedy for wrongs long perpetrated, but I fear if provisions of this kind are incorporated in the measure we will not accomplish our purpose or perform the duty as well as the people desire it should be done. I hope that the amendment of the gentleman from Minnesota (Mr. Volstead) will be adopted. 51 *Cong. Rec.* 9493 and 9494 (1914)

The question of whether defendants in a private suit might use a favorable decree in a prior government suit was specifically considered and expressly rejected when the amendment was adapted by Congress. The idea of determining the rights of private litigants by a prior decree when the interests of the private litigants were not necessarily protected was as repugnant sixty years ago as it is today. The Fifth Circuit in it opinion in this case noted that the remedies of private and public actions are based upon different policy considerations, are considered cumulative and may be pursued in complete

disregard of each other. *United States v. Borden Co.*, 347 U.S. 514, 518-519, 74 S. Ct. 703, 98 L.Ed. 903 (1954).

Petitioners rely on a dicta in a District Court decision to assert that respondents are not entitled to claims for treble damage. In *United States v. General Electric Company*, 358 F.Supp. 731 (1973), the Court granted the Government's motion for summary judgment although the defendant relied on *res judicata* and collateral estoppel as a result of prior actions between the same parties. In that case the defendant stressed its good faith adherence to prior decisions. The petitioners in this case however have not only failed to rely on the 1954 decree, but have violated its orders. The District Court in *U.S. v. General Electric, supra*, apparently relied on *Simpson v. Union Oil Co.* (II), 396 U.S. 13, 90 S. Ct. 30, 24 L. Ed. 2d 13 (1969). In *Simpson*, this Court rejected the contentions that relief should be prospective only. Petitioners cite no cases which deny the right to claim treble damages. The *General Electric* case cites *Lawler v. National Screen Service Corp.*, 349 US 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) which expressly rejected the contention which in effect would grant petitioners partial immunity from civil liability for future violations because such a result is consistent with neither the antitrust laws nor the doctrine of *res judicata*.

At page 32 of petitioners' brief it is asserted that respondents asked only for treble damages. The complaint asks for injunctive relief enjoining the violations of antitrust laws, that contracts be declared illegal and terminated, that petitioners be required to divest themselves of ownership of any interest in certain property, that petitioners be directed to permit all funeral directors the opportunity to freely compete for the right to service burial policies and manufacturers the opportunity to freely supply funeral merchandise. (R 56-58).

Petitioners state at page 29 of their brief that in *K-91, Inc. v. Gershwin Publishing Company*, 372 F2d 1 (9 Cir. 1967) cert.

den. 389 US 1045, 88 S.Ct. 761, 19 L.Ed. 2d 838, Judge Burnes decided that, since the parties had operated in compliance with the decree, the antitrust laws were not violated and the defendants were immunized from liability. Not only was this question not decided, the opinion expressly refutes petitioners' statement.

> Since the trial court found no violations of the antitrust laws, we do not reach the question of whether activities which would otherwise be a violation of the antitrust laws could be rendered immune because consistent with the terms of the consent decree.

The consent decree in *K-91* provided that an applicant who contended that a license fee was unreasonable had a remedy. He could require ASCAP to assume the burden of proving to the District Court that the price charged was reasonable. The Court held that because of the consent decree, ASCAP did not have the power or authority to fix prices; that authority rested with the District Court. In *K-91*, the aggrieved party did not afford himself of the remedy provided.

Petitioners finally assert their own deductions from the opinion in *Columbia Broadcasting System v. ASCAP*, 337 F.Supp. 394 (S.D. N.Y. 1972). Because of the economic realities of the market, the Court recognized, as in *K-91*, that there must be some form of centralized licensing system which serves the mutual interests of copyright holders and music users. Because of these economic realities, this Court has often applied the rule of reason test to activities which would otherwise call for the per se test. The Court in *Columbia Broadcasting*, regarded the judgment in *K-91* as constituting an implied partial repeal of the antitrust laws, with the caveat that the regulatory system may be permitted to encroach upon the antitrust laws only to the minimum extent necessary. *Columbia Broadcasting* held that if CBS could prove that the regulatory system can be amended to operate on a more competitive basis, then the antitrust laws were

being encroached upon more than to the "minimum extent necessary".

Petitioners seek immunity in this case from respondents by virtue of the 1954 decree. They do not seek the application of a rule of reason but ask that the complaint be dismissed. This is in direct contravention of *Columbia Broadcasting*, upon which they rely.

> However, the application of a rule of reason test to ASCAP's activities does not mean that it is immune to the antitrust laws. Nor does the regulation of ASCAP by the consent decree furnish it immunity . . . *Granted that a party is subject to attack under the antitrust laws despite the presence of a consent decree*, the question we are presented with in this case is: Under what circumstances may a defendant's activities, previously sanctioned as falling within the rule of reason, be currently judged to be in violation of the antitrust laws.

The Justice Department and the petitioners, in the 1954 case, found no unusual economic conditions prevailing in the funeral business so as to encroach upon the antitrust laws. They agree to a decree that enjoined petitioners from entering into an agreement, plan or program which directly or indirectly hindered or restricted any funeral director from selling merchandise or performing funeral services. Petitioners now seek immunity from a decree which they have violated.

E. **Combination and Conspiracy Between Separate Corporate Entities.**

Petitioners call upon this Court, at Page 33 of their brief, to determine the "location of the boundaries between legal and illegal business conduct" between a parent corporation and its wholly-owned corporate subsidiary. They contend that this

question is properly raised by their Motion to Dismiss, but they have overlooked two obvious hurdles which prevent them from reaching this question.

Apparently, petitioners contend that the complaint should have been dismissed because there can be no actionable combination or conspiracy under the antitrust laws. Part B of the offenses charged in the complaint, however, alleges that the petitioners have monopolized or attempted to monopolize the funeral business. (R. 36-45) These allegations of violations of Section 2 of the Sherman Act obviously do not require a combination or conspiracy by the express language of the statute:

> Every person who shall monopolize, or attempt to monopolize . . . any part of trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . 15 U.S.C. § 2.

Petitioners cannot contend that there must be a combination or conspiracy before there is a violation of Section 2. This is not the law. A motion to dismiss raising the intra-enterprise conspiracy doctrine is totally inadequate to attack a claim of monopoly or attempt to monopolize.

Petitioners, if successful in raising the question of whether or not a conspiracy between a parent and its subsidiary is actionable, are faced with the clear language in the opinion of this Court, delivered by Mr. Justice Black:

> But since respondents . . . availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities. *Perma Life Mufflers, Inc. v. International Parts Corporation*, 392 U.S. 134, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968).

Even assuming that the broad intra-enterprise conspiracy doctrine cannot be accepted, petitioners cannot prevail on a more

limited interpretation of that doctrine as expressed in the commentaries cited in their brief. At page 41 of their brief, Assistant Attorney General McLaren is quoted as follows regarding the policy of the Department of Justice:

> Instead, we have limited our use of the intra-enterprise doctrine to situations in which the commonly-controlled firms have pooled their power in a manner which has adverse effects on independent business entities.

This was also the policy of the Department of Justice in 1954 when the United States brought the action against these two petitioners for violation of the antitrust laws. (R 153-162). Brown-Service was a wholly-owned subsidiary of Liberty National at that time. (R 154). At page 43 of petitioners' brief, Von Kalinowski recognizes that a conspiracy is actionable where the purpose and effect of the joint action is to unreasonably restrain the trade of outsiders. And even under the most restricted viewpoint, Willis and Pitofsky at page 44 of petitioners' brief, recognize antitrust liability where the enterprise chooses to do business through corporate components with the intent of using these components to achieve an anti-competitive result.

It is clear that under a restricted application of the intra-enterprise doctrine, the conspiracy of the petitioners is applicable. But there is a second barrier to even reaching the question of the applicability of this doctrine. Not only is the conspiracy between the petitioners actionable, the agreements signed by the authorized directors are contracts in restraint of trade. *Perma Life Mufflers, Inc., supra,* unequivocably holds that these agreements are actionable:

> In any event each petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements (cases cited) or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by the communicated danger of termination.

The contracts between Brown-Service and the authorized funeral directors are agreements in violation of Section 1 of the Sherman Act (15 U.S.C. 1).

V

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted

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Certificate of Service

Pursuant to Supreme Court Rule 33.1, I hereby certify that I have caused three copies of this Respondents' Brief in Opposition to Petition for a Writ of Certiorari to be deposited in a United States Post Office or Mail Box, with air mail postage prepaid, addressed to Ira L. Burleson, Liberty National Life Building, Post Office Box 2612, Birmingham, Alabama 35202, and Ralph B. Tate, 800 John Hand Building, Birmingham, Alabama 35203, Counsel of Record for Petitioners on this 16th day of December, 1974.

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